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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF BALTIMORE GAS AND ELECTRIC COMPANY, *ET AL.* TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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The Natural Resources Defense Council's (NRDC) Brief in Opposition to the petitions for certiorari (hereinafter referenced as "NRDC Brief") contains two fundamental misconceptions which merit responses before this Court rules on the petitions for certiorari in this case. First, NRDC mischaracterizes the Table S-3 rulemaking as involving a simple factual finding, NRDC Brief at 19-24, the validity of which is dependent upon a showing that no uncertainties exist as to the environmental effects of waste disposal. Second, NRDC mischaracterizes the D.C. Circuit's decision as a straightforward application of earlier decisions under the National Environmental Policy Act (NEPA)[1] concerning the need for consideration and disclosure of future environmental ef-

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[1] 42 U.S.C. § 4321, *et seq.* (1976), *App.* 430a-434a.

fects. NRDC Brief at 14-19. For the reasons discussed below and for the additional reasons stated in the Baltimore Gas & Electric Co., *et al.*[2] Petition for Certiorari (hereinafter referenced as "BG&E Petition"), the restrictions which Judge Bazelon would impose on agency decisionmaking under NEPA are unique and unauthorized, requiring correction by this Court.

I. THE TABLE S-3 RULE WAS DESIGNED TO PREDICT THE ENVIRONMENTAL EFFECTS OF THE URANIUM FUEL CYCLE, NOT TO RESOLVE ALL CONCERNS ABOUT LONG-TERM WASTE REPOSITORIES

A major premise of respondent's opposition to the granting of the petitions for certiorari is the assumption that the Table S-3 Rule is invalid because there are uncertainties surrounding the long-term disposal of high level nuclear wastes, that are being addressed in other forums.[3] NRDC suggests that, until these uncertainties are resolved in these other proceedings, no rule such as Table S-3 can be adopted.

Simply put, NRDC has ignored the purpose of the Table S-3 Rule. The Table S-3 Rule is a reporting device

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[2] A list including the names of the companies which comprise Petitioners Baltimore Gas and Electric Co., *et al.*, and all parent companies, subsidiaries and affiliates is contained in the Appendix to the Petition for Certiorari. Since that list was filed, petitioners have learned that the Hartford Electric Company has been merged into the Connecticut Light and Power Company. Also, Baltimore Gas and Electric Company has an additional subsidiary, Resource and Property Management, Inc.

[3] For example, in Argument II.B. respondent contends that "[t]he extensive record in this case demonstrates that the Commission's position on the risk of environmental impacts is untenable." NRDC Brief at 19. Respondent then seeks to support this contention by relying on, among other things, factual material outside the Table S-3 rulemaking record, including isolated comments from NRC's Waste Confidence proceeding, *see id.* at 20-21, and from Congressional hearings of nuclear waste legislation, *see id.* at 21-22.

rather than a decision document. As the NRC made clear in promulgating the Table S-3 Rule, the objective of the rule was to identify values that represent certain *secondary* (*i.e.*, offsite) environmental effects of an individual power plant that are common to all plants. 44 Fed. Reg. 45,363, col. 3 (1979), *App.* 347a. The information on uranium fuel cycle effects contained in Table S-3 is factored into environmental evaluations for individual nuclear reactors; the Table S-3 rulemaking did not, nor was it ever intended to, resolve the numerous technological and policy issues involved in making final decisions on the specific methods that will be used in the future for disposing of radioactive waste.

Given the limited purpose of Table S-3, the NRC directed its efforts at formulating a rule which was "as accurate an assessment as reasonably possible" of the environmental effects of a long-term repository.[4] The NRC conducted an exhaustive survey of available information concerning the likelihood that a permanent repository

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[4] *Id.* Thus, the final rule contained neither the detail nor precision of an environmental assessment for the licensing of a long-term repository. This was neither the purpose of the rule nor the Commission's intent. There is an ongoing Federal program for addressing the merits of factual and policy questions about storage of nuclear waste, and Table S-3 can be revised if the outcome of that program shows that the Table S-3 predictions of environmental effects are inaccurate. Those proceedings, which focus on different technical issues and address the entire spectrum of waste management issues, include the Energy Research and Development Administration's (ERDA), and later DOE's, preparation of a generic environmental impact statement for high-level waste management; the NRC's Waste Confidence Proceeding; EPA's effort to promulgate standards for future waste repositories; and Congressional efforts to enact waste disposal legislation.

NRDC would require the NRC to await the resolution of the detailed factual and policy waste disposal issues in these proceedings before adopting a generic rule such as Table S-3. NRDC's suggestion would both tangle unrelated issues and unnecessarily paralyze the NRC's fulfillment of its nuclear power plant licensing responsibilities. Courts have always been reluctant to interpret NEPA

could be built which would isolate nonvolatile wastes from the environment.[5] Furthermore, the NRC specifically included in the methodology underlying Table S-3 various conservative assumptions to ensure that the outcome described in the final rule did not understate potential environmental impacts.[6] The NRC then exercised its broad rulemaking authority under the Atomic Energy Act[7] to make policy judgments as to the probable future resolution of those uncertainties and embodied those judgments in the Table S-3 Rule values.[8]

The NRC's decision to establish a range of likely environmental impacts from a long-term repository and to select the most probable conservative outcome was a proper exercise of agency discretion.[9] NRDC's effort to redefine the objective of the Table S-3 rulemaking should not be allowed to obfuscate the fundamental issue presented by the lower court's opinion—whether the NRC can proceed generically under NEPA to resolve uncertainties as it did in this rulemaking.

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in a way which would so paralyze agency action. Similar restraint is appropriate here. *See, e.g.*, Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973).

[5] BG&E Petition at 8-10. Even NRDC recognizes that "the Commission has compiled thousands of pages of reports, studies, surveys, comments and transcripts" on these issues, and that "[t]echnical experts both within and without the government have been consulted." NRDC Brief at 19. NRDC's complaint is not that the Commission failed to consider all of this information, but that the Commission acted in the face of uncertainty to write a generic rule with which NRDC disagrees. *See* BG&E Petition at 12.

[6] BG&E Petition at 8.

[7] 42 U.S.C. § 2011, *et seq.* (1976); BG&E Petition at 4-5.

[8] BG&E Petition at 8-9, n.20. The NRC specifically considered and rejected NRDC's comment that it *not* resolve uncertainties generically. *See* 44 Fed. Reg. 45,369, col. 1 (1979), *App.* 370a.

[9] NRDC v. NRC, 685 F.2d 459, 518 (D.C. Cir. 1982) (Wilkey, J. dissenting) (hereinafter referenced as *NRDC II*), *App.* 121a; BG&E Petition at 18-19 & n.40.

II. IN INVALIDATING THE TABLE S-3 RULE, THE D.C. CIRCUIT PERFORMED MORE THAN A SIMPLE APPLICATION OF TRADITIONAL CASE LAW UNDER NEPA

Respondent also attempts to characterize the D.C. Circuit's decision as a conventional application of NEPA. NRDC Brief at 14-19.[10] Respondent begins by correctly identifying two purposes of § 102 of NEPA: first, to inject environmental considerations in a federal agency's decisionmaking process, and second, to inform the public that the agency has considered the environmental effects of its proposed action. *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981). Rather than analyzing whether the D.C. Circuit had properly applied these standards to the Commission's Table S-3 Rule and its underlying record, however, respondent apparently assumes that generic predictions of environmental effects cannot satisfy these NEPA requirements where uncertainty remains. *See* NRDC Brief at 13-14. NRDC therefore focuses its response solely on future licensing proceedings, arguing that since all uncertainties cannot be represented by the values contained in Table S-3 itself, the reliance of individual licensing boards on such a rule constitutes a violation of the "consideration and disclosure" requirements of NEPA.[11]

NRDC's lengthy discussion of the meaning of Judge Bazelon's opinion and the case law under NEPA belies its contention that this case involves a straightforward

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[10] NRDC's characterization of the majority's decision in *NRDC II* as straightforward NEPA law is reminiscent of Judge Bazelon's description of his decision. *See* BG&E Petition at 16 n.35 and accompanying text. NRDC's response, which argues NEPA case law at length in an attempt to show that the new NEPA requirements imposed by Judge Bazelon were contemplated in earlier law, merely emphasizes how important it is that this Court look beyond Judge Bazelon's characterization of his decision as a nondescript Administrative Procedure Act (APA) case to the important NEPA questions it raises.

[11] *See* NRDC Brief at 9, 15-17.

application of NEPA. *See* NRDC Brief at 14-19. Indeed, NRDC would be hard pressed to find any support in case law for Judge Bazelon's requirement that agencies catalogue, evaluate, and quantify each and every possible uncertainty underlying future environmental effects. *See* BG&E Petition at 14-20; *NRDC II*, 685 F.2d at 535-37 (Wilkey, J. dissenting), *App.* 159a-161a. Rather, NRDC's assumption that generic predictions as to future environmental effects is impermissible under NEPA where uncertainty exists is precisely the issue which should be addressed by granting these petitions for certiorari.

III. IN INVALIDATING THE TABLE S-3 RULE, THE D.C. CIRCUIT REJECTED A COMMON EXERCISE OF AGENCY RULEMAKING AUTHORITY

The NRC's decision to implement its responsibilities under NEPA by promulgating a generic rule, *see* NRDC Brief at 10, is hardly unique to agencies faced with the responsibility of resolving complex issues that are common to a number of individual proceedings.[12] Agencies often resolve generic issues through rulemaking, and then apply results of that rulemaking to individual proceed-

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[12] Evidently for this reason, the authority of the NRC to resolve generically the uncertainties inherent in this rule has never been questioned in previous proceedings in this case before the lower court or this Court. NRDC v. NRC, 547 F.2d 633, 642-43 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978); Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519, 535 n.13 (1978).

[13] In a factually similar case, the D.C. Circuit in Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979) stated:

> We agree with the Commission's position that it could properly consider the complex issue of nuclear waste disposal in a "generic" proceeding such as rulemaking, and then apply its determinations in subsequent adjudicatory proceedings. Where factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of the questions rather than relitigating the question in each proceeding in which it is raised.

Id. at 416-17.

ings.[13] For example, the Federal Communications Commission and the Federal Power Commission (later the Federal Energy Regulatory Commission) have in many cases used generic proceedings to resolve issues which could also have been dealt with on a case-by-case basis, though less efficiently.[14]

Nothing in NEPA suggests that it, alone among general statutes administered by regulatory agencies, prevents an agency from making rulemaking predictions to resolve issues that are common to a number of cases.[15] To construe NEPA as so constraining an agency's use of rulemaking authority runs counter to this Court's holding in *Vermont Yankee* "that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." 435 U.S. at 548. Certiorari should be granted in this case to correct this judicial intrusion into the area of an agency's procedural discretion to choose between proceeding by rule or adjudication. *See, e.g.*, BG&E Petition at 19-20.

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[14] *See, e.g.*, United States v. Storer Broadcasting, 351 U.S. 192, 201-04 (1956) (FCC rule limiting the number of broadcasting stations a company can own); National Broadcasting Co. v. U.S., 319 U.S. 190, 218-19 (1943) (FCC chain broadcasting regulations); FPC v. Texaco, Inc., 377 U.S. 33, 44, *reh. denied*, 377 U.S. 984 (1964) (FPC rule limiting permissible natural gas pricing provisions in applications for certificates of public convenience and necessity).

[15] *See NRDC II*, 685 F.2d at 535-37 (Wilkey, J. dissenting), *App.* 158a-163a.

[16] As can be seen from the foregoing argument, this case involves more than a unique application of NEPA. Instead, the case presents fundamental issues of administrative law—whether, under NEPA, an agency can act through generic rulemaking and make predictions when future events are uncertain.

IV. CONCLUSION

NRDC's response to the petitions for reconsideration simply emphasizes the importance of the issues presented by the lower court's decision. If the majority opinion below stands, the NRC's ability to implement NEPA generically would be shackled. This Court should grant the petitions for certiorari to correct the lower court's unauthorized restrictions on the NRC's flexibility to regulate the nuclear power industry under the Atomic Energy Act.

Respectfully submitted,

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